Submission No 20

INQUIRY INTO IMPACT AND IMPLEMENTATION OF THE WATER MANAGEMENT (GENERAL) AMENDMENT (EXEMPTIONS FOR FLOODPLAIN HARVESTING) REGULATION 2020

Organisation: Southern Riverina Irrigators

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IMPACT AND IMPLEMENTATION OF THE *WATER MANAGEMENT (GENERAL) AMENDMENT (EXEMPTIONS TO FLOODPLAIN HARVESTING) REGULATION 2020* (NSW)

Submission of Aqua Law on behalf of Southern Riverina Irrigators Inc to the Regulation Committee of the New South Wales Legislative Council

A. INTRODUCTION

1. We act for Southern Riverina Irrigators Inc (**SRI**), the peak representative body of irrigators with farming operations within the Southern Riverina District of New South Wales. We make this submission to the Regulation Committee on behalf of SRI in its representative capacity of its members.

2. SRI considers the promulgation of the *Water Management (General) Amendment (Exemptions to Floodplain Harvesting) Regulation 2020* (NSW) (**Regulation**) to be a serious misstep in the development of New South Wales' water resource management regime. At a time when each Basin State is required, in accordance with its obligations under the *Basin Plan 2012* (Cth) (**Basin Plan**), to be moving towards the implementation of water resource plans designed to restrict water usage and return water to the Murray-Darling Basin, the Regulation operates to entrench years of inaction on excessive water extractions by the practice of floodplain harvesting. In circumstances where floodplain harvesting has been recognised since the Intergovernmental Agreement on a National Water Initiative in 2004[1] as one of the most serious threats to the preservation of the Basin's water resources and ecology, the implementation of blanket exemptions from the licensing and approvals requirements of the *Water Management Act 2000* (NSW) (**WMA**) is a decision which SRI not only strongly opposes, but considers to be legally invalid.

B. SRI'S VIEW ON THE WAY IN WHICH THE REGULATION WAS IMPLEMENTED

3. In addition to the questionable political motives which prompted the implementation of the exemptions, the rapid promulgation of the Regulation under pressure of irrigators in the Northern Basin implicitly recognises that, until the Regulation came into effect on 7 February 2020, the practice of floodplain harvesting in New South Wales was illegal and punishable by way of criminal sanction.

4. The very premise of the WMA regime is the proposition that the rights of control, use and flow of all water resources in New South Wales constitute the State's water rights which vest in the

[1] See [55]-[57].

Crown unless otherwise divested,[2] and that take or usage of any such water must be licensed or approved in accordance with the WMA (**Regime**). Since the introduction of the *Water Management Amendment Act 2014* (NSW) in September 2014, the State's water rights have included "overland flow water",[3] which patently captures waters normally extracted by the practice of floodplain harvesting. From at least that time, the WMA required, on its face, for irrigators engaged in floodplain harvesting to:

(a) hold a relevant floodplain harvesting licence;[4] and

(b) obtain relevant approvals for the use of that water and the construction and use of water management works by which that water was to be captured, transported and stored.[5]

5. Taking water without holding an applicable licence, and similarly using water or constructing and using water management works without the applicable approvals, were and continue to be criminal offences.[6]

6. Although SRI acknowledges that several of the proclamations, by which the licensing and approvals regime was declared with respect to water resource areas in the Northern Basin, excluded the application of the licensing requirements to floodplain harvesting access licences, that same exclusion did *not* apply with respect to water use and water supply work approvals.[7] Accordingly, from at least September 2014, it has been unlawful for irrigators to construct dams, levees, irrigation channels and any other mechanism to capture floodplain waters and to use that water for any purpose not authorised by applicable water usage approvals. That notwithstanding, irrigators across the Northern Basin have continued to construct and use such water supply works and deploy the water captured from flood events for the irrigation of farmland without any oversight or sanction by WaterNSW or, it appears, the National Resources Access Regulator (**NRAR**).

7. The attempt to rectify this regulatory oversight by way of a blanket exemption after years of non-enforcement in the face of known unconstrained usage by Northern Basin irrigators of floodplain waters, is a matter of serious concern for the future efficacy of any policy directed towards

[2] WMA, ss 392, 293(2).
[3] WMA, s 4A defines "overland flow water" as "water (including floodwater, rainfall run-off and urban stormwater) that is flowing over or lying on the ground as a result of rain or any other kinds of precipitation", including water which is flowing over the ground by means of artificial structures.
[4] Under Part 2 of Chapter 3 of the WMA, to the extent that that Part was declared to apply to each relevant water source and access licence as declared by proclamation: see WMA, s 55A.
[5] Under Part 3 of Chapter 3 of the WMA, to the extent that that Part applied to the relevant water source and kind of approval as declared by proclamation: see WMA, s 88A.
[6] WMA, ss 60A, 91A-91F.
[7] See, for instance, *Proclamation under the Water Management Act 2000 (No 92)* in the New South Wales Government Gazette No 110 (1 July 2004) at pg 5004.

restricting overuse of the Basin's water resources and compliance by the State with the Basin Plan and ought to be seriously reconsidered.

8. The Regulation was published on the Legislative Website on 7 February 2020 which was the same day that the *Temporary Water Restriction (Northern Basin) (Floodplain Harvesting) Order 2020* (**Order**) was gazetted.

9. In the view of SRI, the title of the Order is misleading. This is because the explanatory note preceding the Order stated that "the object of this Order is to prohibit the take of water for the purpose of floodplain harvesting across the floodplains within the Northern Basin except where the take is by a work for the purpose of a tailwater return system."

10. Despite this intention, the Order, permitted the take of water by a "water management work", that cannot be reasonably prevented from taking water, due to the nature of the work (**Passive Take**). Prior to the Regulation, the use of water obtained via Passive Take (in this context) was illegal. The effect of the Order and the Regulation therefore legalised access to, and use of, at least 350GL of water, though SRI estimates the true number to be significantly greater.

11. Furthermore, SRI estimates that the amount of water captured via Passive Take is ten to twenty times greater than via other methods. As such, the title of the Order is deceptive as it does little to restrict the amount of water which is floodplain harvested.

12. All users of water within NSW, or at the very least, all irrigators, pay fees for this right. An example fee is the Water Administration Ministerial Corporation (**WAMC**).

13. The Regulation allows the access and use of water that is obtained from floodplain harvesting (via Passive Take or otherwise) without paying the WAMC. In essence, what was - prior to the Regulation, a criminal act - is now an act which is subsidised by the NSW Government. SRI contend that such a dramatic shift in policy by the Water Minister and NSW Department of Planning, Industry and Environment (**DPIE**) would involve some form of public consultation or at the very least an acknowledgement which sets out the circumstances and logic behind the introduction of the Regulation.

14. Consequently, in addition to undermining the Regime, the Regulation decriminalises acts and permits the access to, and use of, significant and unquantified volumes of water without a licence or cost.

C. THE IMPACT OF THE REGULATION

15. There is a wealth of scientific research which demonstrates that floodplain harvesting has significant ramifications not only for the environmental health of floodplain ecosystems, but also for the ecology of rivers that rely on over-bank flows.[8] In the *Murray-Darling Basin Royal Commission Report* (29 January 2019) (**Royal Commission Report**), Commissioner Bret Walker SC concluded that the natural behaviours of Australian rivers and floodplains are being adversely impacted by floodplain diversions,[9] with wetlands in the Northern Basin becoming alienated by such diversions, leading to a loss of connectivity to the river system and, in turn, a declining population of fauna and flora in those areas.[10] The NSW Floodplain Harvesting Policy itself has recognised the negative ecological consequences of floodplain harvesting since it was first published in May 2013.[11]

16. Moreover, the evidence presented to the Royal Commission confirmed that unregulated floodplain harvesting in the Northern Basin presents one of the most significant threats to water security in the Basin to both licence holders and downstream States,[12] with diversions leading to a reduction in floodplain flows through the Barwon-Darling system and the Lower Darling.[13] It is well known that the most significant levels of floodplain harvesting occur in the Northern Basin, primarily in the Namoi, Gwydir and Border Rivers.[14]

17. These consequences are not only matters of significant economic and environmental concern, but as a matter of law, also raise a very real question as to the potential invalidity or inoperability of the Regulation.

18. *First,* SRI considers that the Regulation may be invalid as an impermissible exercise of the regulation-making power vested in the Governor under ss 400(1) or (2) of the WMA. Section 400(1) requires any regulation made under the WMA to be "not inconsistent" with the Act and permits the promulgation of regulations required, permitted or "necessary or convenient" for carrying out or giving effect to the WMA. It is well-accepted that such a power does not enable

[8] Professor Richard Kingsford, Submission to Murray-Darling Basin Royal Commission at page 20.
[9] Royal Commission Report at page 597; University of New South Wales, Centre for Ecosystem Science, Submission on Implementing the NSW Floodplain Harvesting Policy and Better Management of Environmental Water – Consultation Papers (2018) at page 4.
[10] Royal Commission Report at page 598; R Kingsford, "Ecological Impacts of Dams, Water Diversions and River Management on Floodplain Wetlands in Australia" (2000) 25 *Austral Ecology* at 111-116.
[11] Department of Primary Industries Office of Water, *NSW Floodplain Harvesting Policy* (May 2013) at page 2.
[12] Royal Commission Report at page 598. See also Inland Rivers Network, *Managing Floodplains & Rivers for the Future – Floodplain Development and Water Extraction in Inland NSW* (January 2007).
[13] Royal Commission Report at page 598; E Fessey (2006) "The Lower Balonne – an environmental and economic disaster", *Inland Rivers Network Newsletter*, 10(3) at pages 4-5.
[14] See Inland Rivers Network, *Managing Floodplains & Rivers for the Future – Floodplain Development and Water Extraction in Inland NSW* (January 2007) at [3.3].

regulations to be made which extend the scope or general operation of the Act, widen the purposes of the Act, add new and different means of carrying the Act's objects out or depart or vary the plan which the legislature has adopted to attains its ends, but rather requires any such regulations to be strictly ancillary to the legislative regime.[15] Moreover, while s 400(2) specifically authorises the Governor to make regulations which contain exemptions from the operation of the WMA, any exemptions promulgated pursuant to that power must not derogate from or be inconsistent with the WMA. Indeed, the common law recognises that delegated legislation cannot be repugnant to the Act which confers the power to make it.[16]

19. In the context of the WMA, however, the validity of regulations made under the Act are necessarily conditioned upon their conformity with the objects of the WMA and the water management principles enshrined in s 5. That is made patently clear by the fact that all persons exercising functions under the WMA are under a *duty* to:

    (a) take all reasonable steps to exercise those functions in accordance with, and so as to promote, the water management principles of the WMA;[17]

    (b) give priority to the water sharing principles in s 5(3) in the order in which they are set out;[18] and

    (c) exercise those functions in a manner that gives effect to the *State Water Management Outcomes Plan Order 2002* (NSW) (**SWMOP**).[19]

20. Accordingly, those principles, objectives and the SWMOP are not merely policy aspirations to which no legislative force is assigned. Rather, they impose preconditions upon the exercise of power under the WMA, the non-satisfaction of which may lead to the invalidity of any purported exercise of that power.[20]

21. The Regulation falls foul of both the water management principles under the WMA and the SWMOP on several fronts. By effectively exempting all landowners from the criminal prohibitions upon the take and usage of water by way of floodplain harvesting without an applicable licence or works approval, the Regulation continues to exclude floodplain harvesting

[15] *Shanahan v Scott* (1957) 96 CLR 245 at 250 (Dixon CJ, Williams, Webb and Fullagar JJ); *Knightsbridge North Lawyers Pty Ltd v State of New South Wales (No 2)* (2019) 365 ALR 314 at [40]-[41] (Schmidt J).
[16] *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 588 (Dixon J); *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at [54] (French CJ).
[17] WMA, s 9(1)(a).
[18] WMA, s 9(1)(b).
[19] WMA, s 9(2).
[20] *Randren House Pty Ltd v Water Administration Ministerial Corporation* [2020] NSWCA 14 at [138] (Leeming JA).

from the regulatory regime of the WMA. Such an outcome is directly inconsistent with Target 1(d) of the SWMOP,[21] which is concerned with the licensing of floodplain water harvesting extractions in the Murray-Darling Basin and the capping of extractions at 1993/94 levels as well at levels consistent with the long term average annual extraction limit in other water sources. Indeed, the SWMOP identifies the fact that, in the absence of licensing or control processes, further growth in extractions by floodplain harvesting practices would occur, threatening river and wetland health and the water supply to other water uses. The position is put most clearly in the SWMOP's declaration that "leaving floodplain harvesting as a freely available source of additional water supply is no longer acceptable".

22. Moreover, in circumstances where it is readily accepted that unlimited take and usage of floodplain waters presents a clear threat to the sustainability of the Basin's water resources, the Regulation prioritises the economic benefits sought to be realised by the Northern Basin's irrigators to the prejudice of the protection of the water source and its dependent ecosystems. Such an approach ignores the priority which the water management principles accord to the preservation of the Basin's water resources.[22] It is accordingly plain that the negative ramifications of unregulated floodplain harvesting are promoted by the Regulation in a fashion which is repugnant to the objects and purposes of the WMA, and would be liable to being struck down on that basis.

23. *Second*, SRI considers that the Regulation may be inconsistent with the *Water Act 2007* (Cth) (**Water Act**) and/or the Basin Plan, and therefore inoperative pursuant to s 109 of the *Constitution*. The Basin Plan is a Commonwealth legislative instrument which is given effect by legislation passed by the Commonwealth Parliament.[23] As Commissioner Walker SC acknowledged in the Royal Commission Report:

> *"…insofar as the Parliament of a Basin State sought to regulate and manage its water resources in a manner that was inconsistent with the Water Act, the Basin Plan or any WRPs prepared by the MDBA, it would necessarily be invalid to the extent of any such inconsistency, under sec 109 of the Constitution."*

24. SRI does not contend that the NSW Government does not have a degree of latitude in the development of its own regime for the management of water resources within the State, nor that the Water Act and Basin Plan cover the field with respect to the regulation of water take and usage across the Commonwealth. Nonetheless, it is plain that the Water Act and Basin Plan have at their core, the maintenance of a sustainable level of take from the Basin, as confirmed by the

[21] Division 1, Part 2.
[22] WMA, s 5(3). See also *Harvey v Minister Administering the Water Management Act 2000; Tubbo Pty Ltd v Minister Administering the Water Management Act 2000* [2008] NSWLEC 165 at [203] (Jagot J).
[23] Royal Commission Report at page 113.

Water Act's requirement that the Basin Plan identify a long-term average sustainable diversion limit (**SDL**) for the Basin as a whole and for the water resources of each water resource plan area,[24] as well as the requirement that the SDL "reflect an environmentally sustainable level of take".[25] By permitting irrigators to take and use floodplain waters in a manner which has no regard to the usage limits prescribed by the Basin Plan, SRI is concerned that the Regulation will have a very real impact upon compliance within New South Wales with the SDLs prescribed by the Basin Plan and considers the unrestricted take facilitated by the Regulation to be an outcome which alters, impairs or detracts from the operation of the Commonwealth regime.[26]

D. OTHER COMMENTS

25. At a time when the New South Wales Government should be focussing upon finalising and implementing the water resource plans mandated by the Basin Plan in order to realise take which is consistent with the SDL, the promulgation of the Regulation which does the exact opposite is a cause for serious concern. SRI is considering the legal avenues available to it with respect to the Regulation and enforcement of the WMA's sanctions for illegal use of floodplain waters and construction of water management works designed to divert floodplain waters to private irrigation systems and storages, and reserves all of its rights in that regard. In light of the significant legal concerns raised by the Regulation, SRI implores the Regulation Committee to consider the revocation of the Regulation.

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[24] Water Act, ss 22(1), 23(3).
[25] Water Act, s 23(1).
[26] *Victoria v Commonwealth* (1937) 58 CLR 618 at 630 (Dixon J); *Work Health Authority v Outback Ballooning* (2019) 93 ALJR 212 at [32] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).